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IN THE

Supreme Court of the United States

October Term, 1960

No. 648

UNITED STATES OF AMERICA,

Respondent,

—against—

JOSEPH PAUL LaPICCOLO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAURICE EDELBAUM
Attorney for Petitioner

TABLE OF CONTENTS

	PAGE
Basis for Jurisdiction	2
Opinion Below	6
Questions Presented for Review	7
Introduction	8
Trial Evidence	11
Point I—The evidence against petitioner was insufficient to justify a conclusion beyond a reasonable doubt that petitioner was engaged in a conspiracy to violate the Narcotics Laws of the United States	11
Point II—Petitioner was denied due process by the Trial Court's failure to make available to defense counsel Grand Jury testimony by Government witnesses	12
Point III—Petitioner was denied due process by the improper receipt of evidence against him after he had rested his case	12
Point IV—The presumption of possession set forth in Section 174, Title 21 of the United States Code does not apply to this petitioner	13
Conclusion	17

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Joseph Paul Lo Piccolo, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 16th day of November, 1960, affirming the judgment of conviction of the petitioner in the United States District Court for the Southern District of New York, dated July 31, 1958, under which judgment the petitioner was sentenced to twenty years on Count 2, charging a sale of narcotic drugs, and twenty years on Count 5, charging a conspiracy to sell narcotic drugs. Chief

Judge Clark and Circuit Judge Waterman dissented as to the affirmance of the judgment of conviction as to the petitioner herein with respect to Count 2 of the indictment.

Basis for Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit, which is sought to be reviewed herein, was made and entered November 16, 1960. This judgment of affirmance affirmed the judgment of conviction of the United States District Court for the Southern District of New York, which adjudged the petitioner herein guilty of Count 5 of an indictment charging conspiracy to violate the narcotic laws of the United States, Sections 173 and 174 of Title 21, United States Code, and guilty of Count 2 of said indictment, charging the petitioner with receiving, concealing, selling and facilitating the transportation, concealment and sale of narcotics, in violation of Title 21, Sections 173 and 174, United States Code. Petitioner was sentenced to a term of twenty years on each count, said sentence to run concurrently. Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals which affirmed the judgments of conviction under Counts 5 and 2 of said indictment.

The jurisdiction of the United States District Court for the Southern District of New York was invoked in view of the fact that the crimes charged were violations of the Federal laws allegedly committed within the Southern District of New York. The particular statutes involved are Sections 173 and 174 of Title 21, United States Code.

"Sec. 173. Importation of Narcotic Drugs Prohibited; Exceptions; Crude Opium for Manufac-

TURE OF HEROIN; FORFEITURES. It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and cocoa leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported. * * *

"SEC. 174. SAME; PENALTY; EVIDENCE. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five nor more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules, and Title 28, United States Code, Section 1254(1), on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

That prior thereto, and more particularly on the 2nd day of October, 1959, the United States Court of Appeals entered a judgment affirming in part the judgment of conviction of the United States District Court for the Southern District of New York, which adjudged the petitioner herein guilty of Count 5 of an indictment charging conspiracy to violate the narcotic laws of the United States, Sections 173 and 174 of Title 21, United States Code; and wherein petitioner was sentenced to a term of twenty years on said conviction, but the said Court of Appeals, in the same judgment, by a divided Court reversed the judgment of conviction against the petitioner herein, finding him guilty of Count 2 of said indictment, which charged the petitioner, as aforesaid, with receiving, concealing, selling and facilitating the transportation, concealment and sale of narcotics, in violation of Title 21, Sections 173 and 174, United States Code.

That thereafter this petitioner timely filed a petition for certiorari to this Court on December 1, 1959; addressed to the United States Court of Appeals for the Second Circuit, which petition was docketed and entitled as follows: "LoPiccolo vs United States, No. 557, October Term 1959".

That thereafter the Solicitor General of the United States asked for various extensions of time within which to answer said petition by reason of the fact that the United States

Attorney for the Southern District of New York applied to the United States Court of Appeals for the Second Circuit for a rehearing *en banc* by the said Circuit. That on March 9, 1960, a majority of the active circuit judges in said Court *believed the questions raised to be of importance in the administration of the Federal narcotic law*, and granted the petition, Judges Clark and Waterman dissenting.

Reargument as to all appellants was heard on March 16, 1960, by all the then active judges of said Court. A majority of the Court differed with the conclusion of the original panel of the Court and affirmed the conviction with respect to the petitioner on Count 2 and reversed the finding of the original Court, and in addition affirmed the conviction on Count 5 as the Court had originally done upon rendering its decision on October 2, 1959.

The petition for certiorari filed in this Court by the petitioner on December 1, 1959 is still before this Court undetermined.

An application was made to Mr. Justice Harlan of this Court for an order granting the petitioner a thirty-day extension of time within which to file a petition for a writ of certiorari. This application was granted on or about December 19, 1960, and petitioner's time within which to petition for a writ of certiorari was extended to and including the 14th day of January, 1961.

Certiorari is further sought on the ground that the United States Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal law in conflict with applicable decisions and contrary cases of law, has decided an important question of Federal

law which should be clarified and made more definite and certain by this Court, has decided Federal questions of substance not theretofore determined by this Court; and or has decided such questions in a way probably not in accord with applicable decisions of this Court and with other circuits.

Opinion Below

The opinion of the United States Court of Appeals which affirmed in part the judgment of conviction of the petitioner entered in the United States District Court for the Southern District of New York is reported in 270 Fed. 2d, Report No. 206 of the United States Court of Appeals for the Second Circuit Reports, October Term 1958. A copy of said opinion was forwarded under separate cover by petitioner's co-defendants in said action, who are likewise petitioning for a writ of certiorari, and the Court is respectfully referred to said opinion, which is incorporated herein by reference.

The aforementioned opinion of the United States Court of Appeals, and the judgments based thereon, were dated and entered the 2nd day of October, 1959. The opinion of the United States Court of Appeals before the Second Circuit which sat *en banc*, was dated and entered the 16th day of November, 1960, and a copy of said opinion has likewise been forwarded under separate cover by petitioner's co-defendants in said action, who are similarly petitioning for a writ of certiorari, and the Court is respectfully referred to this opinion, which is incorporated herein by reference.

Questions Presented for Review

The petitioner repeats and reiterates the questions presented in his original petition for certiorari which was filed in this Court on December 1, 1959, and which as aforestated has not yet been decided, which are as follows:

(1) Whether the evidence against petitioner at the trial was sufficient to justify the conclusion beyond a reasonable doubt that petitioner was engaged in a continuing conspiracy to violate the Narcotic Laws of the United States in violation of Sections 173 and 174 of Title 21 of the United States Code.

(2) Was there a denial of due process in failing to make available to defense counsel Grand Jury testimony of Government witnesses?

(3) Was there a denial of due process by the improper receipt of evidence against petitioner after he had rested his case?

In addition, in view of the reversal by the Court of Appeals for the Second Circuit, sitting *en banc* of its original decision on Count 2 with respect to the petitioner herein, the following additional questions are presented:

(4) Is proof that one defendant possessed narcotics sufficient to sustain the conviction under 21 U.S.C. Section 174 of all who aid and abet that one defendant, even though the alleged abettors never had physical or constructive possession of the narcotics?

(5) Whether or not a person adjudged to be constructively in possession of a narcotic drug can be guilty under

Section 174 Title 21 United States Code as the aider and abettor of a principal charged with the sale of said drug?

(6) Whether or not a person who does not have actual physical possession of the narcotic drug can be chargeable with the presumption as set forth in Section 174 of Title 21 United States Code?

Introduction

The appellant, Joseph Lo Piccolo, was indicted with ten others, James Santore, Peter Casella, Emilio D'Aria, James Massi, Ignazio Orlando, his father, Lorenzo Orlando, Anthony Tarlentino, Nicholas Narducci, Anthony Napolitano and Nicholas Tolentino.

The indictment contains four substantive counts, charging the possession or sale of narcotics: the first count charges Casella, Santore, D'Aria and Massi with a sale on October 21, 1957; count three relates to an alleged sale by Casella and Santore on December 11, 1957; count four charges Ignazio Orlando, Tarlentino, Narducci, Napolitano and Tolentino with possession of drugs on January 21, 1958.

None of these charges involve the appellant Lo Piccolo in any way, and the greater part of the trial record is barren of any reference to him. Two counts of the indictment charge crimes against the appellant. These are count two, which charges Lo Piccolo with a sale of narcotics on December 11, 1957 and count five, which charges all of the defendants with a conspiracy to violate the narcotic statutes.

The judgments of conviction of these two crimes are based upon no direct evidence connecting Lo Piccolo with

any traffic in narcotics. The negligible activity which resulted in Lo Piccolo's conviction for the substantive offense carried an aura of criminality only by reference to the "conspiracy" evidence regarding transactions of the other defendants. This evidence—originally inadmissible against Lo Piccolo—is, of course, chargeable against him only if his involvement in a conspiracy was independently proven. But the government—as far as Lo Piccolo is concerned—was permitted to prove his guilt of the substantive crime through its conspiracy evidence concerning Santore, Castella and Ignazio Orlando. Absent this conspiracy proof, there was nothing even remotely tending to connect the defendant's otherwise innocent comings and goings with a substantive narcotic offense. Conversely, the conspiracy evidence became admissible against Lo Piccolo only by surmising his guilt of the substantive crime.

All of the witnesses for the government were Treasury Department agents. Their testimony spans a period of eleven months between February 1957, when one of the agents, Picini, first met the defendant Santore in Philadelphia and January 23, 1958, when all of the defendants were arrested. However, the government charged that the conspiracy in the case at bar did not begin until September 1957, and the testimony regarding transactions with Santore and Casella between February and September 1957, while highly incriminating as to them, was not admitted against the defendant Lo Piccolo.

The evidence actually admitted against Lo Piccolo deals with events alleged to have transpired on October 21, October 23, December 11 and December 19, 1957, and on January 20, January 22 and January 23, 1958. The testi-

mony is voluminous (the government's case consists of over 1200 pages of stenographic minutes), but the major portion of this testimony is largely cumulative. It is most readily apprehended when divided according to the various dates set out above and when considered in chronological order rather than when stated as the testimony developed at the trial. Accordingly, the evidence is considered chronologically, *infra*. It will be noted that we have treated the evidence in the light most favorable to the Government. All of the evidence stated—with one or two minor exceptions—is contained in the direct testimony of the prosecution's witnesses with no weight being ascribed to the testimony elicited upon cross-examination which was, of course, more favorable to the defendants. The exceptions to this treatment occur only where the Government conceded the inaccuracy of the direct testimony.

We have culled the trial record for every reference to the defendant Lo Piccolo and all such references are included in the appendix filed herewith. The cumulative substance of all the testimony regarding Lo Piccolo does nothing more than to establish that he knew and associated with one of the other defendants, Ignazio Orlando, and that he knew and spoke to a second defendant, Peter Casella.

But caught in the all embracing web of a conspiracy prosecution, the defendant—a first offender—has been convicted and sentenced to a term of imprisonment of twenty years.

Apart from the insufficiency of the proof with respect to Lo Piccolo, other serious procedural errors appear in the record.

These arise because of the trial court's failure to turn over to defense counsel certain sworn testimony of the gov-

ernment witnesses for use in cross-examination; the trial judge's refusal to read the Grand Jury testimony of the government witnesses and the reception of highly prejudicial testimony after the defendant Lo Piccolo had rested his case.

Trial Evidence

The petitioner herein incorporates by reference all of the allegations contained under this Title in petitioner's original petition for a writ of certiorari, No. 557, October Term 1959, which is still undetermined by this Court, with the same force and effect as if set forth herein at length.

POINT I

The evidence against petitioner was insufficient to justify a conclusion beyond a reasonable doubt that petitioner was engaged in a conspiracy to violate the Narcotics Laws of the United States.

The petitioner incorporates herein by reference all of the arguments under this point which are contained in petitioner's writ for certiorari to this Court, No. 557, which is now on file with this Court and has not as yet been determined, with the same force and effect as though herein fully set forth at length.

POINT II

Petitioner was denied due process by the Trial Court's failure to make available to defense counsel Grand Jury testimony by Government witnesses.

The petitioner incorporates herein by reference all of the arguments under this point which are contained in petitioner's writ of certiorari to this Court, No. 557, which is now on file with this Court and has not as yet been determined, with the same force and effect as though herein fully set forth at length.

POINT III

Petitioner was denied due process by the improper receipt of evidence against him after he had rested his case.

The petitioner incorporates herein by reference all of the arguments under this point which are contained in petitioner's writ for certiorari to this Court, No. 557, which is now on file with this Court and has not as yet been determined, with the same force and effect as though herein fully set forth at length.

POINT IV

The presumption of possession set forth in Section 174, Title 21 of the United States Code does not apply to this petitioner.

Section 174, Title 21, United States Code, reads in part as follows:

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

All of the judges sitting *en banc* agreed that the evidence in this case at no time showed beyond a reasonable doubt that this petitioner ever had actual physical possession of the heroin. The majority of the Court has taken the position that constructive possession is enough to bring the presumption into play. Petitioner respectfully submits to this Court that there is not an iota of evidence to justify the conclusion that the petitioner had even constructive possession of the heroin. Chief Judge Lumbard, in his opinion states:

> "It appears possible, if not probable that the narcotics were brought to Lo Piccolo's apartment by Ignazio Orlando, the courier for the conspiracy and never left his possession before they were deposited in the agent's hotel room. The proof points clearly however to Lo Piccolo's supervision over the entire errand, even to the extent of accompanying Orlando to the hotel and waited outside in his car, which was

> used for the trip, while Orlando deposited the goods in the room. As constructive possession is enough to bring the presumption into play, the conviction of Lo Piccolo is affirmed."

The proof in this case merely showed that Lo Piccolo was seen riding in an automobile from the Lo Piccolo apartment to the hotel, where the co-defendant, Orlando, went into the hotel alone and allegedly deposited some narcotics in the hotel room. There was not an iota of proof to show by any evaluation of evidence that Lo Piccolo knew that Orlando was in possession of narcotic drugs and was delivering it to the hotel on the trip to the hotel from Lo Piccolo's apartment. Lo Piccolo merely was seen riding in the passenger seat alongside of Orlando, who drove the car. This observation was made by Federal agents who testified to same at the trial. There was no additional proof of any kind to impute knowledge to Lo Piccolo of the contents of any package. As a matter of fact, Orlando was not even seen carrying a package from the automobile through the lobby of the hotel and into the hotel room. The most that agents testified to was seeing Orlando appear on a floor of the hotel, walk up the corridor, enter a hotel room and later in the hotel room was discovered a package of narcotics. Circuit Judge Waterman, in his dissenting opinion with respect to Count 2 of the Indictment, stated as follows:

> "I do feel compelled to state my reasons for disagreeing with the view of three of my colleagues with reference to the interrelationship of 18 U.S.C. Sec. 2 and 21 U.S.C. Sec. 174. They appear to be of the belief that proof that one defendant possessed narcotics would be sufficient to sustain the convic-

tion under 21 U.S.C. Sec. 174 of all who aid and abet that one defendant, even though the alleged abettors never had physical or constructive possession of the narcotics. I submit, first, that when one invokes the general aiding-and-abetting statute, 18 U.S.C. Sec. 2, one offends the statutory scheme of 21 U.S.C. Sec. 174; and, second, that even if this invocation were proper it would in no way lessen the need to prove that the alleged abettor possessed the narcotics. Therefore, I fear that if this view should become established in this or any other circuit, it would only serve further to confuse an already untidy area of the law.

Section 174 forbids: (1) knowing illegal importation of narcotics; (2) receipt, concealment, purchase or sale of narcotics known to have been illegally imported; (3) facilitation, in any manner, of the transportation, concealment or sale of narcotics knowing the narcotics to have been illegally imported; and (4) any conspiracy to commit any of the above enumerated acts. At the risk of understatement one may say that this detailed statute is comprehensive. *To engraft the general provisions of 18 U.S.C. Sec. 2 onto this statute, so clearly an all-inclusive and self-contained one, would be to increase the duplications that already exist. For example, I doubt that the line between aiding and abetting on the one hand, and conspiracy on the other, has ever been satisfactorily drawn.* Compare *Cosgrove v. United States*, 224 F. 2d 146, 150-55 (2 Cir. 1954) and *Pereia v. United States*, 347 U. S. 1, 11 (1954). How much more difficult it will be to draw a distinction between, for instance, aiding and abetting the sale of narcotics, and the facilitation, in any manner, of such a sale. My three colleagues would make such a distinction, for the statutory scheme they envisage would

require proof of possession when a defendant is charged with the facilitation of the narcotics traffic but not when he is accused of aiding and abetting this traffic. I cannot join in attributing such eccentricity to Congress.

"I have a further difficulty with reliance upon 18 U.S.C. Sec. 2, even if one assumes that 21 U.S.C. Sec. 174 is not all-inclusive, and 18 U.S.C. Sec. 2 may be employed to buttress a charge of violating 21 U.S.C. Sec. 174. To be guilty of aiding and abetting the commission of a crime of a type that requires that the principal have a specific intent or have specific knowledge, the defendant abettor must be shown to have shared fully in that intent or knowledge. *Johnson* v. *United States*, 195 F. 2d 673, 675 (8 Cir. 1952); *Bacon* v. *United States*, 127 F. 2d 985, 987 (10 Cir. 1942); *Morei* v. *United States*, 127 F. 2d 827, 830-31 (6 Cir. 1942). See also *Ramirez* v. *Chavez*, 71 Ariz. 239, 226 P. 2d 143, 146 (1951); *Combs* v. *Commonwealth*, 224 Ky. 653, 6 S.W. 2d 1082, 1084 (1928); *Osborne* v. *Baughman*, 85 Cal. App. 224, 259 Pac. 70 (1927). A fact required to be proved in order to convict a principal under 21 U.S.C. Sec. 174 is his knowledge that the narcotics were illegally imported. This knowledge may either be proved directly or by the defendant's failure satisfactorily to explain his possession of the narcotics. Inasmuch as the purported aider-and-abettor must be shown to have had this same knowledge, it also follows that his knowledge can be proved only in these two ways. Thus under 21 U.S.C. Sec. 174 personal possession, whether physical or otherwise, is as essential to the conviction of an offending aider and abettor as it is to the conviction as a principal of one who commits a specific offense."

Judge Waterman, in his opinion of October 2, 1959, reversing Count 2 at that time stated:

> *"But, as there was no evidence to show that Lo Piccolo knew that any of the drugs with which he or his fellow conspirators dealt, were contraband, we can sustain his convictions only if we can find that he had possession of the drugs. The record fails to establish that Lo Piccolo ever possessed heroin as early as December 11, 1957, physically, or by controlling the disposition of it, or otherwise. The drugs sold on that date were delivered to the agents' room by Ignazio Orlando. While it is quite likely that Orlando got the room key from Lo Piccolo there is no evidence tending to show that he also obtained the heroin from him. Similarly, there is no evidence tending to establish, that, with respect to the heroin sold on December 11, Lo Piccolo had that type of control which we have seen was exercised by the defendants Casella, D'Aria and Massi. Consequently, his conviction on Count Two must be reversed."*

A reading of all the opinions in this case clearly demonstrates complete confusion as to an important law dealing with the administration of the Federal Narcotics Law, and, therefore, this Court should grant certiorari in order to clarify the same.

CONCLUSION

This petition, and the petition filed in this Court on December 1, 1959 for certiorari should be granted, and this Court, in the exercise of its powers should order all judgments of conviction of the petitioner herein reversed and the matter remanded to the appropriate court to be dealt with accordingly.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner

Nos. 648 and 635 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSEPH PAUL LO PICCOLO, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES SANTORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON SUPPLEMENTAL PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:

Cellino v. *United States*, 276 F. 2d 941 6

United States v. *Cox*, 277 F. 2d 302 6

Statutes:

18 U.S.C. 2 ..... 2, 6, 7

21 U.S.C. 174 ..... 2, 5, 6, 8

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 648

JOSEPH PAUL LO PICCOLO, PETITIONER

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UNITED STATES OF AMERICA

No. 635 Misc.

JAMES SANTORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON SUPPLEMENTAL PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the original opinion of the court of appeals nor its opinion on rehearing *in banc* is yet reported.

JURISDICTION

The judgment of the court of appeals *in banc* was entered on November 16, 1960. The supplemental petition of James Santore for a writ of certiorari was filed on December 17, 1960. On December 16, 1960, Mr. Justice Harlan extended the time for filing a sup-

plemental petition for writ of certiorari on behalf of Joseph Paul Lo Piccolo to and including January 14, 1961. The supplemental petition of Joseph Paul Lo Piccolo for a writ of certiorari was filed on January 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the judgment of the court of appeals *in banc*, reinstating petitioners' convictions on count 2 (as to which concurrent sentences were imposed), furnishes sufficient additional reason for the Court to consider this case.

STATUTES INVOLVED

18 U.S.C. 2 provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. 174 provides as follows:

> Whoever fradulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States

contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * * *

STATEMENT

1. From the original judgment of the court of appeals, five petitions for certiorari were filed which are still pending before this Court, Nos. 15, 16, 17, 5 Misc., and 6 Misc., this Term. The two petitions that have now been filed by Lo Piccolo (No. 648) and Santore (No. 635 Misc.) seek review of the modifications to its original judgment made by the court of appeals on rehearing *in banc*, and are supplemental to the original petitions filed by those two defendants (Nos. 17 and 5 Misc., respectively). The circumstances giving rise to the supplemental petitions are as follows:

The indictment, naming the five petitioners and other defendants, charged, in counts 1–4, substantive narcotics offenses and, in count 5, a conspiracy. The district court, sitting without a jury, found all de-

fendants guilty as charged. Lo Piccolo was convicted on counts 2 and 5 and was given concurrent sentences of twenty years on each of the two counts. Santore was convicted on counts 1, 2, 3, and 5 and was given concurrent sentences of twenty years on each of the four counts. The original judgment of the court of appeals, entered by a three-judge panel, reversed their convictions on count 2 but affirmed on the other counts. To review the judgment of affirmance on the other counts, Lo Piccolo and Santore filed their original petitions for certiorari (Nos. 17 and 5 Misc.).

Primarily because of the complete reversals of the convictions of two other defendants, Narducci and Tarlentino, the government petitioned for a rehearing *in banc* by the court of appeals, which was subsequently granted. On the rehearing, the court of appeals adhered to the reversals of the convictions of Narducci and Tarlentino, and the government has not petitioned for certiorari from that part of the decision. The court did, however, reverse itself as to Lo Piccolo and Santore on count 2 and reinstated their convictions on that count (a decision which, since the sentences on the several counts were concurrent, did not affect their total sentences). It is to bring up for review their now-affirmed convictions on that additional count that Lo Piccolo and Santore have filed their supplemental petitions.

2. The facts are set forth in the government's consolidated brief in opposition in Nos. 15, 16, 17, 5 Misc., and 6 Misc. Those directly relevant to count 2 (the sale of a half kilo of heroin on December 11, 1957), to which the present petitions are directed,

may be found at pp. 8–9 of that brief. Since the petitions will presumably be considered and disposed of together, they will not be repeated here.

3. In the original majority opinion, written by Judge Waterman, it was held that the term "possession", as used in 18 U.S.C. 174, "includes not only immediate physical control but also that control which is exercised through agents". On a finding that Santore had not exercised any proprietary control over the drugs in count 2, he was held not to have had possession.[1] Lo Piccolo, it was held, did not exercise control over the transaction. Judge Hand (in dissenting as to defendants D'Aria and Massi) expressed the view that, in order to invoke the statutory presumption, the narcotics should be either in the actual custody of an accused or unconditionally subject to his demand for custody. Judge Byers (who favored affirmance of the conviction of all defendants) was of the opinion that the partnership relation should be determinative, rather than Judge Hand's test of a right at any particular time to demand custody. The discussion in the opinions of the original panel was thus on the proof necessary to show "possession," a matter discussed in the government's brief in opposition heretofore filed.

When the court of appeals reconsidered the case *in banc*, the participating judges—the six active circuit judges, which included of the original panel only

[1] No mention was made of Santore's actual knowledge of illegal importation, based on his presence at the preliminary meeting when Casella referred to his merchandise as being "just as it comes off the boat."

Judge Waterman—were unanimously of the view that dominion and control constitute possession as much as manual custody of narcotics, citing in addition to cases already considered the recent cases of *United States* v. *Cox*, 277 F. 2d 302 (C.A. 2) and *Cellino* v. *United States*, 276 F. 2d 941 (C.A. 9). On that basis, the principal opinion, written by Judge Lumbard, held that the evidence showed supervisory control by Lo Piccolo over the narcotics involved in count 2 and hence sufficient possession to give rise to the presumption of illegal transportation. As to Santore, it was held, four of the six judges concurring, that Santore had actual knowledge of illegal importation by reason of hearing the assertion by Casella that the quality of his merchandise was "just as it comes off the boat". Judge Lumbard also went further in his opinion and made the principal ground for upholding Santore's conviction his role as an aider and abettor (18 U.S.C. 2) in the transaction. On this point the court was equally divided.

ARGUMENT

1. The supplemental petition of James Santore is out of time, having been filed more than thirty days after the judgment of the court of appeals was entered.

2. The issue on which there was an equal division in the court of appeals—whether one shown to be an aider and abettor of a person possessing narcotics may be held to knowledge of illegal importation and convicted under 21 U.S.C. 174 without proof of personal knowledge or personal possession—is not really present in the case.

a. Even as to the reinstated count 2, it is not necessary to reach the question of the applicability of the aiding and abetting statute (18 U.S.C. 2) to the conviction of Santore and Lo Piccolo, although that question was of significance as to the two defendants now out of the case, Narducci and Tarlentino. As four members of the court point out, and none deny, Santore was present at the preliminary meeting, which he himself had arranged between Casella and the two agents, when Casella said he could supply heroin in unlimited quantities, "with the quality just as it comes off the boat" (II R. 15–16, 32). This broad assertion was not limited to any particular transaction, but was Casella's statement of his capability to supply any demand by the two men he supposed were illicit dealers. The phrase "as it comes off the boat" is subject to no other interpretation than that the narcotics were imported, which importation for any purpose is prohibited by statute. Since there was direct and actual knowledge of illegal importation, it was unnecessary to invoke the statutory presumption.

As to Lo Piccolo, the evidence discussed in detail in the government's prior brief and in the opinion of Judge Lumbard below shows that he was the principal conspirator, with supervisory control over the transaction described in count 2. He was the supplier of the heroin which was delivered to the Hotel Edison on the evening of December 11, 1957. Judge Friendly (who did not believe that the aiding and abetting statute applied to proof of knowledge of illegal importation) agreed that the proof showed that

the heroin delivered by Orlando had been in Lo Piccolo's possession and that Orlando transported the heroin on Lo Piccolo's instructions, so that Orlando's possession was Lo Piccolo's.

b. Moreover the reinstatement of the convictions of the two petitioners herein on count 2 has no effect on their total sentences of twenty years each, as the sentences on all counts were made concurrent. All the judges of the court below who have passed on the case have always been in agreement that the conspiracy count against these petitioners was amply proved. For the reasons discussed in our prior brief in opposition, this conclusion is clearly correct and petitioner's attack thereon raises no question warranting review.[2]

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[2] If the issue of the significance of the aiding and abetting statute should be reached, the government would take the position that the aiding and abetting statute may properly be considered in prosecutions under 21 U.S.C. 174, as it applies by its terms to all offenses against the United States. Moreover, we agree with the views expressed by Judge Smith that where possession by one of co-conspirators is a necessary part of the common scheme, the possession by one is the possession of all the partners.

CONCLUSION

For the reasons stated, it is respectfully submitted that the supplemental petitions for certiorari should be denied.

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